



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/735,697	12/12/2000	Noel Lee	P1230	6750

7590 06/07/2011
LaRIVIERE, GRUBMAN & PAYNE, LLP
P.O. BOX 3140
MONTEREY,, CA 93942

EXAMINER

DEBERADINIS, ROBERT L

ART UNIT	PAPER NUMBER
----------	--------------

2836

MAIL DATE	DELIVERY MODE
-----------	---------------

06/07/2011

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte NOEL LEE

Appeal 2010-002446
Application 09/735,697
Technology Center 2800

Before ALLEN R. MacDONALD, CARLA M. KRIVAK,
and THOMAS S. HAHN, *Administrative Patent Judges*.

HAHN, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

In the Request for Rehearing, filed May 13, 2011 (hereafter “Request” or “Req. for Reh’g”), Appellant contends that the Board erred in the Decision on Appeal entered March 24, 2011 (hereafter “Decision”), by affirming all obviousness rejections of claims 49-62.

Appellant argues that the panel erred by (i) incorrectly construing Dwight (US Des. 401,220) (Req. for Reh’g 3-4, 7-8, and 12-15), which is prior art relied on for the rejections; (ii) “failure to follow and improper use

of the MPEP [Manual of Patent Examining Procedure]” (Req. for Reh’g 9-12); and (iii) disregarding a Notice of Allowance under MPEP § 706.04 (Req. for Reh’g 15-17).

OPINION

The Decision has been reconsidered in view of the Request and no errors have been found. Therefore, the Decision is not modified for the following reasons.

I

Appellant contends Dwight was incorrectly construed because in contradiction to the Examiner’s finding this cited prior art does not teach having different colored rings positioned about outlets on a power strip (Req. for Reh’g 3-4, 7-8, and 12-15). According to Appellant the asserted incorrect interpretation arises from “confusion” that “persisted until a few days before the hearing . . . on March 10, 2011” (Req. for Reh’g 4). Both the asserted misconstruction of Dwight and the contended occasioning “confusion” were not raised in briefs before the Board. The Request, however, is silent as to seeking permission for consideration of new arguments or new evidence absent from the briefs. *See* 37 C.F.R. § 41.52 (a)(1) and (2). Consequently, the record, including the filed briefs and the Request, is reviewed on the bases of evidence entered and addressed in the briefs and considered by the Examiner. Arguments and concessions set out

in the briefs are not requested to be withdrawn from the reviewed record as is implied in the Request.

Aside from the general reference as to when the asserted misconstruction and “confusion” were discovered (*supra*), Appellant has not identified or explained basic background particulars for these contentions raised subsequent to all briefs being filed, e.g., who discovered the asserted “confusion” and misconstruction, how they were discovered, and why they were or could not have been discovered prior to about March 10, 2011. (The Final Action from which this appeal arises was mailed on June 14, 2005, a first Appeal Brief was filed on December 19, 2005, and a Reply Brief was filed on August 28, 2006.)

At the March 10, 2011 Oral Hearing, Appellant’s counsel for the first time raised the contention before the Board that “confusion” caused Dwight to be misconstrued as teaching use of color for a design feature. In contrast, the filed briefs do not contest the Examiner’s finding that Dwight teaches “a power strip housing having a plurality of colored areas (different hatching indicating different colors)” (Ans. 4). For example, Appellant’s Appeal Brief concedes that “[t]he Dwight apparatus merely comprises thin colored rings disposed at a notable radius away from the outlets” (App. Brief 19).

Reviewing the record, including the Request, does not alter the earlier fact finding that Dwight teaches use of symbolic lines associated with ring structures (*see* Dwight Fig. 1, a perspective view, and Fig. 5, a right side elevation view) that comply with practices set out in MPEP § 608.02 for

showing different colors (Decision 5). In particular, MPEP § 608.02(IX), Drawing Symbols, is referenced, where specific symbolic line patterns for representing different colors are set out. Comparing these identified symbolic line patterns and the Dwight drawings, e.g., Fig. 5, shows unequivocal use of patterns that represent red or pink, orange, green, blue, and violet or purple. Furthermore, in spite of Appellant's contentions that Dwight has been misconstrued, the Request concedes that "some of the [Dwight drawing] cross hatching seems to utilize the USPTO drawing guidelines, MPEP § 1503.02 and § 608.02 to indicate color" (Req. for Reh'g 8).

Accordingly, the panel continues in adopting the Examiner's finding that Dwight shows pluralities of different colored areas (Decision 5).

II

Appellant's contended "confusion" in construing Dwight is asserted in the Request as arising from the following: "according to MPEP 15.05.041, 'In any drawing lined for color, the following descriptive statement *must* be inserted in the specification (the specific colors may be identified for clarity)'. (emphasis added); --The drawing is lined for color ----'" (Req. for Reh'g 8). The Dwight specification does not include this quoted statement. Appellant states that the Decision "references this issue [i.e., using the quoted statement] and includes the curious statements that absence of the statement is 'harmless because the record is silent as to there being consequent confusion'" (*id.*).

Appellant's reliance on the MPEP as directing a mandatory requirement for using the quoted statement is mistaken. MPEP § 1503.02 includes form text under the caption "¶ 15.05.041 *Informal Color Drawing(s)/Photograph(s) Submitted*", which is exclusively relied on by Appellant. This form text is provided for copying and use by Examiners. As quoted in the Decision, MPEP § 1503.02 states that the quoted statement "'should be inserted . . .'" (Decision 5). The complete sentence from MPEP § 1503.02 (V) reads: "If the formal drawing in an application is lined for color, the following statement *should* be inserted in the specification for clarity and to avoid possible confusion that the lining may be surface treatment -- The drawing is lined for color. --" (emphasis added). Thus, the MPEP explicitly provides that use of the quoted statement is permissive with the intended purpose of avoiding possible confusion. Its use is not a mandatory procedure. Consequently, if an Examiner determines that there may be confusion between showing color or surface treatment by using symbolic line patterns the "¶ 15.05.041" form text can be copied and used. No evidence in the record identifies that the Examiner for the Dwight design patent made such a determination or set out such a requirement.

In view of Appellant's misreading of the MPEP § 1503.02 permissive procedure concerning the quoted statement, it is not necessary to reach Appellant's argument that the MPEP has the force of law (Req. for Reh'g 9-12).

Upon review, the record, including the Request, fails to identify *evidence* of any prior finding or even suggestion of possible confusion other than Appellant's current contention of confusion. Accordingly, the panel disagrees with Appellant's contention that the MPEP has not been followed or has been improperly used.

III

Appellant also asserts the Board overlooked the previously made argument (App. Br. 27) that it was improper under MPEP § 706.04 to withdraw allowance of claims (Request 15-17). In part, MPEP § 706.04 states that "[a] claim noted as allowable shall thereafter be rejected only after the proposed rejection has been submitted to the primary examiner for consideration of all the facts and [there is] approval of the proposed action." In raising this matter Appellant is seeking review of a discretionary determination that is delegated to a primary examiner. Appellant's recourse for an adverse determination is through petition to the Director. This is not a dispute within the Board's jurisdiction. *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967).

Appellant's argument was not overlooked.

Appeal 2010-002446
Application 09/735,697

DECISION

The Request has been granted to the extent of reconsidering the Decision, but the Request is denied with respect to modifying the Decision.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

REHEARING DENIED

rwk